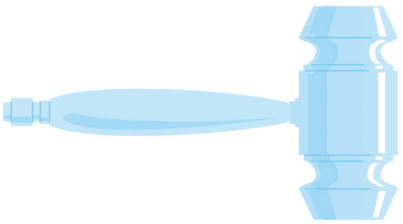
Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

The Principal's Place in the Culture Wars – General, Private or Spectator?

Principals are being attacked on all sides in the culture wars. Some principals believe that the attacks are coming from school boards, from parents, from students, from outside community groups, from advocacy groups and/or others. It is a lot to handle, to process and to address. When the Association's Executive Director, Dr. Eric Eshbach, asked that I write on this topic, I expressed that it would take a book to address all of the issues associated with this subject. I will attempt to provide the essential points that principals need to keep in mind in the approximately 3,000 words allotted to this column.

Before I get into the meat of this article, I must make a disclaimer. Most of the issues in the culture wars are not a matter of settled law. Some issues have been clearly decided. For example, transgender students have the right to use the bathrooms and the locker rooms consistent with their gender identity. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018). However, many issues are not settled, such as the right of transgender students to compete in sports on the teams that are consistent with their gender identity or issues associated with the removal of books or flags from classrooms or libraries. In addition, it is this author's opinion that we witnessed a revolution in the Supreme Court and its methodology for deciding constitutional cases when it issued several novel decisions in the spring of 2022. Although the *Dobbs* decisions was the focus of the media, a short phrase appearing in the Supreme Court's decision in *Kennedy v. Bremerton School District*, is a significant change. The court said: "[t]he First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2413(2022). Never before has the Supreme Court applied the *Tinker* standard to employees. Consequently, it is possible that some of the principles that I discuss in this column may not stand the test of time as the culture wars continue to be waged. In the meantime, I offer the following.

First and foremost, always remember that principals are employees and are required to comply with their duties as employees. That means if a school district adopts a rule implicating one of the issues in the culture wars, the principal must not violate the rule. Willful neglect of duties is a basis for discipline or discharge under section 1122 of the School Code, 24 P.S. §11-1122. Principals must comply with their job descriptions and with the school district's Policies, Administrative Regulations, Code of Conduct and other applicable school district requirements.

If your supervisor asks to talk to you about an issue in the culture wars and what you are doing regarding the issue, you have a duty of cooperation and a duty to respond to the questions. Long ago, the Pennsylvania Supreme Court said: "When a [tenured employee] refuses to answer, upon being asked by his superior, . . . this is evidence, . . . of 'a lack of professional fitness' of responsibility to the [tenured employee's] profession and to the school system, and such refusal to answer, 'constitutes a willful violation of the school laws of this Commonwealth.'" *Kaplan v. Sch. Dist. of Philadelphia*, 388 Pa. 213, 226, 130 A.2d 672, 679 (1957). Unlike employees in a collective bargaining unit, principals do not have "Weingarten" rights to be represented at such a meeting when the principal is being questioned. The United States Supreme Court held that an employer's denial of employee's request that union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action violated the employee's rights. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). However, this rule does not apply to the "meet and discuss" groups that are for the limited pur-

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poses of arriving at a compensation plan under section 1164 of the School Code, 24 P.S. §11-1164.

Although principals must comply with school district requirements, that does not mean that principals are not citizens. Principals are entitled to express their views. The issue is when and how those views are expressed and the probable effects of the expression of those views. Context matters and facts matter so you must be careful that your expression of your views is protected under applicable law and does not cross the line. There are a few fundamental rules to keep in mind.

> The United States Supreme Court has said:
> [A] citizen who works for the government is nonetheless a citizen. The First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. *See Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972). So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively. *See, e.g., Connick, supra*, at 147, 103S. Ct. 1684, 75 L. Ed. 2d 708 ("Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government").

Garcetti v. Ceballos, 547 U.S. 410, 419 (2006).

> On the other hand, in that same case, the court said:
> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.

Id. at 421.

It is sometimes difficult to know when principals are making statements pursuant to their official duties or speaking as private citizens. But it is often easy to make that determination. When a principal is speaking at an assembly or graduation ceremony, it is pursuant to their official duties. When a principal is determining what books to keep in the library and speaks on the subject, it is pursuant to his/her official duties. When the principal posts announcements on the school's website, it is pursuant to the principal's duties.

However, if the principal opposes what the school board is or is not doing with library books, for example, there are ways to engage in professional speech that is respectful and protected under the law. For instance, unrelated to your duties as an employee, you can speak about matters of public concern under the Free Speech Clause of the First Amendment as long as you do not violate applicable rules too many to enumerate here. Suffice it to say that such speech is not totally protected under the First Amendment even when the First Amendment applies.

Other laws that protect certain speech is found in the various anti-discrimination laws, such as Title IX, Section 504, the Americans with Disabilities Act ("the ADA"), the Age Discrimination in Employment Act ("the ADEA") and Title VII. All of these laws contain anti-retaliation provisions, although the precise scope of the protections is not exactly the same in all of the laws. What this means is that if you advocate for rights that are protected by those laws, the school district cannot take an adverse job action against you. For example, the anti-retaliation provisions of Title VII provide the following:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.** It shall be an unlawful employment practice for an em ployer to discriminate against any of his employees . . . *because he has opposed any practice made an unlawful employment practice by this title* [42 USCS 2000e–2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS 2000e–2000e-17].

42 U.S.C.S. 2000e-3. (Bold in the original; italics added.)

Principals have the right to oppose any employment practice of the school district that is unlawful under Title VII. It is critical, therefore, to know what is unlawful under Title VII because opposition to employment practices that are not unlawful is not protected.

In terms of the culture wars, the United States Supreme Court held that discrimination by an employer against a transgender employee is a violation of Title VII. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020). Therefore, if a school district has a practice of prohibiting a transgender employee from using the bathroom consistent with his/her gender identity, a principal's opposition to that practice is protected. However, the principal cannot engage in that opposition while he/she is supposed to be performing his/her duties. Just like union representatives are protected when engaging in "concerted action," they are not permitted to engage in union activities while they are supposed to be performing their duties. Therefore, a "building representative" is supposed to be "prepping" during his/her preparation period and can be disciplined if he/she is interviewing witnesses for an upcoming grievance instead. As stated previously, context and facts matter.

One of the ongoing issues in the culture wars is the use of pronouns by employees and students. There is no jurisprudence no body of law – on the issue of pronouns. There are no laws governing pronoun usage. Pronouns are a matter of grammar and English usage. However, some individuals prefer to use pronouns and would like others to use pronouns that are not consistent with grammar or the definitions of the words. It is my opinion that the only legal rules that seem to be established for the use of pronouns is that transgender students have the right to use and be referred to with the pronoun consistent with their gender identity. Although the *Boyertown* case did not address pronoun

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usage, the analysis of the court is such that it would not be reasonable to conclude that a transgender student has the right to use the bathroom consistent with his/her gender identity, but not the pronoun consistent with his/her gender identity. However, concluding that transgender employees and students have the right to use the pronoun that aligns with his/her gender identity does not automatically give any other individual, regardless of preference or sexual orientation, the right to use any pronoun that he/she desires. A male student, for example, cannot declare that he is "gender neutral" or "non-binary" and that he wants people to refer to him as "they" or "it." Having a safe, welcoming and nurturing environment does not require that the dictionary be thrown out and that others be compelled to engage in speech with which they may disagree. The First Amendment prohibits government from compelling speech. However, there may be situations -- other than the situation of a transgender student – where there may be a reason under another law to use a different pronoun. For example, the student may have a disability that is to be accommodated by the use of the student-chosen pronoun. The student may be subject to bullying or unlawful harassment, and the remedy may be to address pronoun usage. But there is no legal right for a student or employee to simply require others to violate the rules of grammar or to misuse the definitions of words like pronouns.

In the prior paragraph, I suggested that there may be laws that compel a school district to use other than the usual pronouns for a student -- such as the disability discrimination laws or the anti-bullying laws. In fact, I can identity over 30 different laws, regulations and school district policies that are implicated by pronoun and name usage. The complete list is as follows:

1. The Free Speech clause of the First Amendment;
2. The Free Exercise clause of the First Amendment;
3. The constitutional right of Parents to raise their children under the Fourteenth Amendment;[1]
4. The Equal Protection clause of the Fourteenth Amendment;
5. The Family Educational Rights and Privacy Act ("FERPA");[2]
6. The regulations under FERPA;[3]
7. The Protection of Pupil Rights Act;[4]
8. The regulations under the Protection of Pupil Rights Act;[5]
9. The Individuals with Disabilities Education Act ("IDEA");[6]
10. The regulations under the IDEA;[7]
11. Section 504 of the Rehabilitation Act of 1973 ("Section 504 ");[8]
12. The regulations under Section 504;[9]
13. The Americans with Disabilities Act ("the ADA");[10]
14. The regulations under the ADA;[11]
15. Title IX of the Education Amendments of 1972 ("Title IX");[12]
16. The regulations under Title IX;[13]
17. The Pennsylvania Human Relations Act;[14]
18. The Child Protective Services Act;[15]
19. The anti-bully provisions of the School Code;[16]
20. Section 1317 of the School Code;[17]
21. Pennsylvania's Judicial Change of Name Statute;[18]
22. Regulations regarding amendments to birth certificates;[19]
23. The confidential communications to school personnel provision of the Judicial Code;[20]
24. The confidential communications to psychiatrists or licensed psychologists provision of the Judicial Code;[21]
25. Chapter 14 of the regulations of the State Board of Education;[22]
26. Chapter 15 of the regulations of the State Board of Education;[23]
27. 22 Pa. Code 4.4(c);[24]
28. 22 Pa. Code 11.41;[25]
29. The law regarding the age of majority in Pennsylvania;[26]
30. The Code of Professional Practice and Conduct for Educators;[27] and
31. Multiple School Board Policies, including the following:[28]
    a. Policy 216, regarding student records.
    b. Policy 826, regarding protected health information.

There is not enough space in this column to address how names and pronouns implicate these laws, regulations and policies, but I will provide a few examples. Suppose a teacher decides to give his students a survey asking for them to provide their "preferred pronouns." It is my opinion that such a survey arguably is in violation of the Protection

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of Student Rights Law, 20 U.S.C.A. §1232h. That law provides, in part, as follows:

> No student shall be required . . . to submit to a survey . . . that reveals information concerning . . . (3) sex behavior or attitudes; . . . (7) religious practices, affiliations, or beliefs of the student or student's parent; . . ., without the prior consent of the student (if the student is an adult or emancipated minor), or in the case of an unemancipated minor, without the prior written consent of the parent.]

20 U.S.C.S. § 1232h.

A student's preferred pronoun implicates sex behavior or attitudes and potentially religious beliefs. Consequently, such a survey should not be distributed to students, particularly without obtaining prior consent. This section also implicates Pennsylvania law as to the age of majority. For many purposes under federal law, when a student turns 18, designated parental rights transfer to the student. This section of the law, however, does not transfer the age of consent to age 18. Instead, it would appear to transfer at age 21. In Pennsylvania, the Statutory Construction Act defines an "adult" for statutory purposes as "An individual 21 years of age or over." 1 Pa.C.S. § 1991.

Suppose that the survey is conducted, and a boy responds that he wants to be referred to as "they." Is anyone required to call him "they"? Are teachers or administrators required to call this male student "they" just because he answered a survey question that "they" is his "preferred pronoun"? Are other students required to call him "they"? Are visitors and other parents in the school required to call him "they"? If the school is committed to a caring, safe and nurturing environment, and if it makes the student feel better to be called "they," does that mean when teachers meet to discuss their students outside of the presence of the student, the teachers are required to refer to the male student as "they" in that meeting? If, as a result of the meeting, records are prepared, does the writer of the records have to use the word "they" when referring to "him" in the records? Are the answers to any of these questions different if the student is six years old, or if the student is 19? Are the answers to any of these questions different if the parent opposes the student's wish- es? Is it "child abuse" if the parents oppose the child's wish to be called "they"? Is it "child abuse" if a teacher or coun-selor does not use the student's preferred pronoun? Is it a matter of unconstitutional "compelled speech" to require employees or other students to call the child "they"? One court summarized the applicable legal principles as follows:

> "It is firmly established that freedom of speech prohibits the government from telling people what they must say." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 61, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006); *see, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943) (state law requiring schoolchildren to recite Pledge of Allegiance and salute the flag held unconstitutional). This freedom to decide "what not to say" is an "important manifestation of the principle of free speech," *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995), and has been held to limit "the government's ability to force [a] speaker to host or accommodate another speaker's message." *Rumsfeld, 547 U.S. at 63*.

Emilee Carpenter, LLC v. James, 575 F. Supp. 3d 353, 370 (W.D.N.Y. 2021).

The answer to all of the foregoing questions is, "it depends." It depends upon context and other facts. For example, is the student disabled under the Individuals with Disabilities Education Act ("the IDEA") where the use of the preferred pronoun is necessary to enable the child to receive a free appropriate public education ("FAPE")? Is the preferred pronoun required under the student's Individualized Educational Program ("IEP") or the student's service agreement under Chapter 15 of the State Board regulations? *See* 22 Pa. Code, Chapter 15. In short, depending upon the context and facts, there may be different answers to these questions.

> **"A student's preferred pronoun implicates sex behavior or attitudes and potentially religious beliefs."**

The best advice I can provide to principals to address these issues and to answer these questions is to advise that it is not your job to answer them or to make the decisions as to what to do. But it is your job to recognize when these issues need to be addressed in your building and to refer the issues to those whose job it is to develop the answers and to provide guidance as to how the specific issue is to be handled. One student may have the right to be called "they," but another student may not. *It all depends.*

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End Notes

[1] As stated by the United States Supreme Court, "[t]he Constitution protects a parent's right to raise his children. *See Troxel v. Granville*, 530 U.S. 57, 66, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)." *United States v. Shultz*, 733 F.3d 616, 623 (6th Cir. 2013).
[2] 20 U.S.C.A. § 1232g (establishing certain privacy and access rights for students and parents to student records).
[3] 34 C.F.R., Part 99.
[4] 20 U.S.C.A. § 1232h (limiting certain student surveys, analysis and evaluations).
[5] 34 C.F.R., Part 98.
[6] 20 U.S.C.A. § 1400*et seq.* (regulating specially designed instruction and related services for students with disabilities).
[7] 34 C.F.R., Part 300.
[8] 29 U.S.C.A. §794 (regulating specially designed instruction and related services for students with disabilities; prohibiting discrimination against students with disabilities).
[9] 34 C.F.R., Part 104.
[10] 42 U.S.C.A. § 12101*et seq.* (prohibiting discrimination of individuals with disabilities).
[11] 28 C.F.R., Part 35 (nondiscrimination on the basis of disability in state and local government services).
[12] 20 U.S.C.A. § 1681 (prohibiting sex discrimination).
[13] 34 C.F.R., Part 106.
[24] 43 P.S. § 951 (prohibiting discrimination, including sex discrimination).
[35] 23 Pa.C.S.A. § 6301 (prohibiting child abuse and mandating certain reporting).
[46] 24 P.S. § 13-1303.1-A (prohibiting bullying of students).
[57] 24 P.S. §13-1317 (Every teacher, vice principal and principal in the public schools shall have the right to exercise the same authority as to conduct and behavior over the pupils attending his school, during the time they are in attendance, including the time required in going to and from their homes, as the parents, guardians or persons in parental relation to such pupils may exercise over them.")
[68] 54 Pa.C.S.A. § 701 *et seq.* (regulation, use and change of names).
[79] 28 Pa. Code §1.3.
[20] 42 Pa.C.S.A. § 5945 (protecting confidential communications of students made to certain school personnel).
[21] 42 Pa.C.S.A. § 5944 (protecting confidential communication of students to school psychologists).
[22] 22 Pa. Code, Chapter 14 (governing specially designed instruction and related services for children with disabilities).
[23] 22 Pa. Code, Chapter 15 (prohibiting discrimination of students with disabilities).
[24] 22 Pa. Code §4.4(c) (requires access to educational programs without discrimination on the basis of a student's sexual orientation).
[25] 22 Pa. Code §11.41(a) provides: "Each school board shall adopt written policies concerning district child accounting, attendance, admission, excusal and program procedures as necessary to implement this chapter. The policies shall be a matter of public record."
[26] The Statutory Construction Act defines an "adult" as "[a]n individual 21 years of age or over." 1 Pa.C.S.A. §1991, Consequently, for purposes of statutes engaged after September 1, 1937, the "age of majority" in Pennsylvania is generally 21. For purposes of the Rules of Civil Procedure in Pennsylvania's Courts, however, that age of majority is 18 years of age or older. Pa.R.C.P. 76. This implicates certain rights between a student and the student's parents. However, notwithstanding the general rules that a child is not an "adult" until age 21, there are many specific federal and state statutes that terminate parental rights at age 18 or transfer those rights to the student upon attaining age 18.
[27] 22 Pa. Code, Chapter 235.
[28] Policies that are implicated regarding students' names include 216, 210, 231 and others.

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The Pennsylvania Principals Association is seeking articles for its **Spring 2023 THEME issue of *The Pennsylvania Administrator* magazine. The theme for this issue is: *"Creative Solutions to Current Issues in Education."* Articles based on this theme will be considered for publication in this issue by the Editorial Review Board.**

What are your districts/schools doing for the following, post-COVID? Please focus on one or more of the following bullets in your article:

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